

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Affidavit

77-6106

To be argued by
PETER C. SALERNO

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-6106

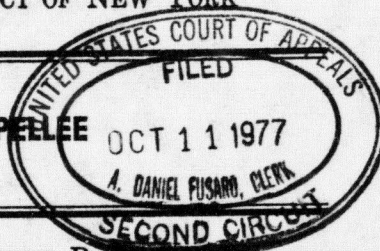
NATIONAL MUFFLER DEALERS
ASSOCIATION, INC.,
Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE



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NATIONAL MUFFLER DEALERS ASSOCIATION, INC.,
Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,
Defendant-Appellee.

BRIEF FOR APPELLEE

Preliminary Statement

This is an appeal by the National Muffler Dealers Association, Inc. ("the Association") from a judgment entered in the United States District Court for the Southern District of New York on June 6, 1977, dismissing the complaint. (A. 273).^{*} This judgment was entered after a one-day trial before the Honorable Lawrence W. Pierce, sitting without a jury, on May 24, 1977. Judge Pierce's findings of fact and conclusions of law were delivered orally at the conclusion of the trial and are set forth at A. 155-60.

This brief is submitted on behalf of the defendant-appellee, the United States of America.

^{*} "A." refers to pages of the joint appendix.

Issue Presented

During any of the fiscal years ending November 30, 1971, 1972, and 1973, was the Association exempt from income taxation as a "business league" within the meaning of section 501(c)(6) of the Internal Revenue Code of 1954, as amended ("the Code"), 26 U.S.C. §501(c)(6)?

Statement of the Case

A. The Proceedings to Date

This is an action for a tax refund, jurisdiction of which is conferred by 28 U.S.C. §1346(a)(1). The Association filed with the Internal Revenue Service ("IRS") an application for exemption from Federal income taxation under section 501(c)(6) of the Code on December 29, 1971. (A. 162-63). The exemption was denied initially on March 28, 1972 (A. 165), and this determination was adhered to, after protest, on June 18, 1974. (A. 166).

The Association subsequently paid taxes for the years 1971, 1972, and 1973, in the amounts of \$1,237.00, \$1,431.00, and \$2,689.00 respectively, for a total of \$5,357.00. In September, 1974, the Association filed claims for refund of these amounts. (A. 167-73). The claim for the year 1972 was denied on March 24, 1975 (A. 182), and the claims for the other years were deemed denied by the Internal Revenue Service's failure to rule on them for six months. 26 U.S.C. § 6532(a)(1). The proper filing of an administrative claim is a jurisdictional prerequisite to a refund action in district court. 26 U.S.C. § 7422(a).

This action was commenced by the filing of a complaint on July 1, 1975. (A. 2). The Government answered

on October 30, 1975. (*Id.*)* In March and April, 1976, both parties moved for summary judgment. (A. 2). In an order filed May 4, 1976, Judge Pierce denied the motions, finding that there were issues of fact requiring a trial. (A. 9-14).

The trial took place on May 24, 1977, and judgment was entered on the district court's decision dismissing the complaint on June 6, 1977. (A. 273). The notice of appeal was filed on June 28, 1977. (A. 2, 274).

B. The Facts

The Association was organized in January, 1971 under the New York Not-For-Profit Corporation Law as a trade association of muffler dealers. (A. 213-18). The Association is comprised *entirely* of Midas Muffler franchisees. (A. 223). Approximately 73% of all Midas Muffler franchisees belonged to the Association as of January 14, 1976 (A. 233), and 80% at the time of trial. (A. 47). The percentage was lower, somewhere above 50%, for the tax years that are the subject of this action (1971-1973). (A. 55). No member of the Association is known to be a franchisee of any other muffler company. (A. 224).

As originally adopted, the by-laws of the Association provided that "Any muffler dealer holding a valid *Midas* Muffler franchise shall be eligible for membership." (A. 184; emphasis added). On October 23, 1972, in an attempt to resolve its difficulties in obtaining tax-exempt status, the Association amended the above provision, as well as another provision referring to "Midas," to eliminate the word "Midas." (A. 198, 252).

* The Government demanded a jury trial with its answer (A. 7), but waived a jury at trial. (A. 26-27).

Despite the amendment, the Association has never attempted to solicit non-Midas dealers for membership. A solicitation letter to non-members of the Association, dated November 27, 1975, begins "Dear Fellow Midas Dealer," and is devoted entirely to praising Midas' and the Association's efforts "to improve the Midas program." (A. 254).

The Association's activities are directed entirely toward improving the position of Midas dealers, and some of those activities benefit only members of the Association. The principal function of the Association is, and was during the tax years in question, to act as a bargaining agent for its members in their dealings with the Midas company. (A. 36-38, 227). The Association's formation was prompted by Midas dealers' problems in their capacity as franchisees, and specifically by a concern that they would be hurt by quarrels in the family that owned Midas. (A. 36, 220-21).

The principal accomplishments of the Association in the area of relations with Midas are recognition as a bargaining force (A. 250), the negotiation of a more favorable franchise agreement during 1971-1972 (A. 36-39), the elimination in 1972 of a service charge exacted from customers who took advantage of the Midas guarantee (A. 36-41), and the negotiation of a lower price for pipe purchased from Midas. (A. 41-42). This last item occurred in 1974 or 1975, outside the tax years in question. (A. 41). These activities benefitted Midas dealers who were not members of the Association, as well as members. (A. 46).

The only other activities of the Association are an annual convention, some insurance programs, and newsletters. (A. 43-44). These activities are available only to Midas dealers who are members of the Association, except that a newsletter is occasionally sent to a non-member to induce him to join. (A. 43-44, 47).

At the trial of this action, the Association attempted to introduce evidence that its activities conferred a benefit on the public, and that Midas was such a dominant force in the muffler industry that an association of Midas dealers constituted a "line of business" within the meaning of the applicable Treasury Regulation, to be discussed *infra*.

The proffered evidence on public benefit consisted entirely of opinion testimony, first offered through Myron Gordon, the executive director of the Association and its attorney (A. 16, 53), and then through Gilbert Meisgeier, executive director of the National Franchise Association Coalition. (A. 59).

Mr. Gordon testified to the need of franchisees of Midas to form an association to bargain with their powerful franchisor. (A. 50, 54). He was then asked to give an opinion, with no apparent foundation other than the need for the Association and his "exposure to the industry," that the public was benefitted by its activities. (A. 53). Mr. Gordon stated that the public benefitted because all muffler dealers were forced by competition to follow the price reductions that the Association had obtained through its dealings with Midas. (A. 50). That testimony was stricken when it became evident that it was not based on personal knowledge. (A. 51-53).

Mr. Meisgeier, like Mr. Gordon, testified to the need for associations of franchisees to strengthen their position in dealing with their franchisors. (A. 60-65, 68-70). Counsel for the Association sought to qualify Mr. Meisgeier as an expert "regarding the public interest to be served by the existence of franchisee associations." (A. 82). However, since it was evident that Mr. Meisgeier's only area of expertise was the problems of *franchisees*, the District Court refused to declare him an expert on public benefit. (A. 83).

The proffered "line of business" evidence was that of Robert Kaden, whose market research firm, Goldring & Company, conducted an "image and attitude" study for Midas in 1975, after the tax years at issue in this case. (A. 85, 94, 255). The hard facts shown by this survey are as follows (A. 255-72):

In the period from approximately August, 1974 to August, 1975, 29% of a number of male car owners questioned in 18 metropolitan areas in the United States stated that they had replaced a muffler during that period. (A. 261, 263, 266). Of a group of 842 such owners who had replaced a muffler, questioned in the same 18 metropolitan areas, 21% stated that they had replaced their muffler at Midas; 23% had replaced their muffler at a garage or service station; 27% had replaced their muffler themselves; 11% had replaced their muffler at an "other" muffler specialty outlet; 10% had replaced their muffler at a mass merchandiser (Sears, Wards, etc.); and 8% had replaced their muffler at a new car dealer. (A. 263, 266).

During the survey period, Midas enjoyed a significantly higher brand name awareness among those replacing mufflers than did any other brand of muffler. (A. 113, 267). Also, of 597 men who had replaced a muffler during that period, 30% said they would go to Midas for their next replacement. (A. 266).

If appropriate adjustments are made in the market share figures, it is evident that Midas' true share of the muffler replacement market was substantially lower than the 21% shown by the survey. Among other reasons, the above figures were arrived at from polling in 18 metropolitan areas *where Midas did business*. (A. 110, 128-30). Mr. Kaden himself testified that a completely random nationwide sampling, including rural areas, would result in a lower market share for Midas. (A. 118).

Despite a market share of less than 21%, in a precise amount not established, Mr. Kaden offered his *opinion* that Midas was in a "unique" and "dominant" position in the muffler industry, based entirely upon the extensive public awareness of the name, and the fact that some other muffler dealers had followed Midas' lead on various marketing policies. (A. 113, 115-16). He said, in describing what he meant by "dominant":

"Well, through our interpretation when a company is so well-known in a field and so dominant *in terms of consumer awareness*, they have almost a responsibility on top to the industry. They are so well-known in the industry that they almost become generic to the industry, and what they do to a large extent is emulated and followed when leading from such a strong position, so what Midas does would seem to have influence on what the other factions of the industry also do." (A. 115; emphasis added).

Elsewhere, Mr. Kaden opined that, despite Midas' lower market share in rural areas, "their *dominance in terms of awareness and image* I would have to believe would still be one of prominence." (A. 118). Mr. Kaden explicitly recognized the distinction between dominance in terms of awareness and dominance in the actual market: "Awareness is one thing; where they replace is something else." (A. 140).

In his findings of fact rendered at the conclusion of the trial in this case, Judge Pierce reached the only conclusions he could reasonably reach on the record before him: that the Association's activities benefitted only Midas dealers; that "Midas dealers alone do not constitute a line of business," in that appellant had not established

the market share held by Midas;* and that the Association's activities conferred at best an indirect benefit on the public. (A. 157). Accordingly, the court held that appellant had not established that it was a "business league" within the meaning of the Code, and it was therefore not entitled to the exemption or the refund it sought.

ARGUMENT

Appellant Was Not A "Business League" During Any Of The Tax Years In Question.

Viewed most favorably to the appellant, the evidence at trial demonstrated that its activities confer direct benefits only on Midas dealers, who accounted for less than one-fifth of the muffler sales in the United States for the tax years in question. Its activities do not bring it within the meaning of the term "business league" in the Code, as that term has been construed by the Treasury and by the vast majority of cases that have dealt with the issue.**

Sections 501(a) and (c)(6) of the Code provide that the following are exempt from federal income taxation:

"Business leagues, chambers of commerce, real estate boards, boards of trade, or professional foot-

* By implication, if Midas accounted for 100% of muffler sales, it might be a line of business. The District Court appears to have found that the Association had failed to establish *any* market share for the years in question. While the Government agrees with this conclusion, we also contend that even the market share shown by appellant's own figures, *i.e.*, 21%, is not sufficient to render Midas dealers a "line of business."

** The taxpayer has the burden of proving that it is entitled to a refund. *Helvering v. Taylor*, 293 U.S. 507, 514 (1935); *Lewis v. Reynolds*, 284 U.S. 281, 283 (1932); *Compton v. United States*, 334 F.2d 212, 216 (4th Cir. 1964).

ball leagues (whether or not administering a pension fund for football players) not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual."

The regulation interpreting this section provides:

"A business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. An organization whose purpose is to engage in a regular business of a kind ordinarily carried on for profit, even though the business is conducted on a cooperative basis or produces only sufficient income to be self-sustaining, is not a business league. An association engaged in furnishing information to prospective investors, to enable them to make sound investments, is not a business league, since its activities do not further any common business interest, even though all of its income is devoted to the purpose stated. A stock or commodity exchange is not a business league, a chamber of commerce, or a board of trade within the meaning of section 501(c)(6) and is not exempt from tax." Treas. Reg. § 1.501(c)(6)-1.

This regulation has been in effect since at least 1918, through successive re-enactments of the statute, and is "determinative of its meaning." *Credit Bureau of Greater New York, Inc. v. Commissioner*, 162 F.2d 7, 9 (2d Cir.

1947). See also *Evanston-North Shore Board of Realtors v. United States*, 320 F.2d 375, 377 (Ct. Cl. 1963), *cert. denied*, 376 U.S. 931 (1964); *General Contractors' Ass'n of Milwaukee v. United States*, 202 F.2d 633, 634 (7th Cir. 1953) (above regulation has force of law).

On its face the regulation sets up several criteria that define a "business league," a term that is completely undefined by the statute itself. One criterion, in the first sentence of the regulation, is that the association consist of persons with a common business interest, and not be engaged in a business "of a kind ordinarily carried on for profit."

Another criterion, in the second sentence, is that the organization be "of the *same general class* as a chamber of commerce or board of trade." (Emphasis added). This is simply a common sense expression of the doctrine of statutory construction referred to as *noscitur a sociis*, requiring that a vague term like "business league" be defined in a manner similar to other, more specific words in a statute. This Court has expressly applied that doctrine to section 501(c)(6), in requiring that a business league possess "the general characteristics of these other organizations with which the statute groups it." *Produce Exchange Stock Clearing Ass'n v. Helvering*, 71 F.2d 142, 144 (2d Cir. 1934).

A third criterion, which the regulation derives from the previous ones, is that a business league's "activities should be directed to the improvement of business conditions of one or more *lines of business* as distinguished from the performance of particular services for individual persons." (Emphasis added).

The appellant in plain terms argues to this Court that in fact the statute does *not* require its activities to affect an entire line of business, despite the clear language of

the regulation and consistent court constructions over the years. (Br. 10). See cases cited at p. 15 *infra*. The basic thrust of other portions of its argument, in which the growth of franchising as a mode of conducting business is discussed, is that Congress should provide a tax exemption for associations like the appellant. This supposed historical development has nothing to do with construction of the existing statute.

Clear authority in the Second Circuit requires the conclusion that the Association is not a "business league." In *Produce Exchange Stock Clearing Ass'n v. Helvering*, 71 F.2d 142 (2d Cir. 1934), the Court held that an organization performing a securities transaction clearing service for its members (who could be any broker trading on the Produce Exchange, 71 F.2d at 143), paid for by a uniform fee, was not a business league. The Court reasoned:

"The numerous subdivisions of [the predecessor to Section 501] and the corresponding provisions in the earlier acts, specify organizations which, in the great majority of instances, are *evidently granted exemption because of the benefit to be derived by the public from their activities*. . . . There is reason why these should be favored, but none is apparent for exempting an association which merely serves each member as a convenience or economy in his business. . . .

* * * * *

. . . The petitioner's activities are solely for the direct benefit of its so-called 'clearing members.' Nothing is done to advance the interests of the community or to improve the standards or conditions of a particular trade, as in the case of chambers of commerce, real estate boards, and boards of trade. *Under the familiar doctrine of noscitur a sociis, a business league to be exempt*

must possess the general characteristics of these other organizations with which the statute groups it. The petitioner does not possess them; its purpose is simply to provide a business economy or convenience for individual traders."

71 F.2d at 143-44 (emphasis added; citations omitted).

This reasoning governs the case at bar. The National Muffler Dealers Association's activities benefit only its members, except as non-member Midas dealers may enjoy the fruits of the Association's bargaining efforts with Midas, or as they may occasionally receive the informative Newsletter with a membership solicitation. As the District Court found, its activities have no broader beneficial effect on the "standards or conditions of a particular trade," which includes *non*-Midas muffler dealers, or on the community at large (A. 157).^{*} Indeed, the Association's "public benefit" argument appears to be of recent origin. As stated in a 1974 newsletter, "the Association is every dealer's insurance policy to maintain the value of his franchise." (A. 250).

The Association is thus not a business league because, in the language of the regulation, "its activities [are not] directed to the improvement of business conditions of one or more lines of business. . . ." The Association has nothing to do with promoting the muffler business. *Cf. American Plywood Ass'n v. United States*, 267 F. Supp. 830 (W.D. Wash. 1967) (association's quality control and promotional activities benefitted entire plywood industry; promotion of own trademark and other non-exempt activities only incidental to primary activities).

^{*} The District Court was clearly correct in refusing to declare any of appellant's witnesses "experts" in the area of public benefit, since no proper foundation for such expertise was laid.

The only case we have discovered involving an association of merchants dealing with a particular brand of product is *Pepsi-Cola Bottlers' Ass'n v. United States*, 369 F.2d 250 (7th Cir. 1966). This case was relied on extensively by plaintiff throughout the administrative proceedings that preceded this lawsuit, and is relied on here as well. (Br. 10-11). In a 2-1 decision, the Seventh Circuit held that an association whose members "engaged in the bottling and sale of Pepsi-Cola," formed "to promote, extend, further, protect, and improve the trade and business of bottling and selling Pepsi-Cola," and which, among other things, "represent[ed] its members vis-à-vis the Pepsi-Cola Company," was an exempt business league. 369 F.2d at 251. This decision is wrong for several reasons, and the Internal Revenue Service does not follow it. Rev. Rul. 68-182, 1968-1 Cum. Bull.

3, relying on the Second Circuit's decision in *Produce Exchange Stock Clearing Ass'n v. Helvering*, discussed above.

In *Pepsi-Cola*, the Seventh Circuit rejected the Government's argument that a league affiliated with only one brand of product was not a "line of business," and that the association's benefits inured only to its members and merely provided them with "a convenience and economy in their business . . ." 369 F.2d at 251.

The Court apparently reasoned, first, that public consumers benefitted from the association's activities as a result of improvement in the Pepsi-Cola bottling business. *Id.* at 252. It is difficult to see how such a benefit accrued, and the opinion merely states the conclusion without any apparent support. In any event such a public benefit was clearly incidental to the association's primary function of improving the business of Pepsi-Cola bottlers. Other courts have repeatedly held that if an organization's primary purpose or function is non-

exempt, then an incidental benefit to the public, or other incidental effect, will not render it exempt. *E.g.*, *Contracting Plumbers Cooperative Restoration Corp. v. United States*, 488 F.2d 684, 688 (2d Cir. 1973), *cert. denied*, 419 U.S. 827 (1974) (by implication); *United States v. Omaha Live Stock Traders Exchange*, 366 F.2d 749 (8th Cir. 1966); *Evanston-North Shore Board of Realtors v. United States*, 320 F.2d 375, 378 (Ct. Cl. 1963) (opinion by Justice Reed); *General Contractors' Ass'n of Milwaukee v. United States*, 202 F.2d 633 (7th Cir. 1953); *Underwriters' Laboratories, Inc. v. Commissioner*, 135 F.2d 371 (7th Cir. 1943).

The Seventh Circuit simply applied the wrong standard when it said, "[t]o be a business league it need not be devoted entirely to the general public welfare." 369 F.2d at 252. This may be true, but it must be devoted *primarily* to one or more of the exempt functions set forth in the regulation. See cases cited in previous paragraph.

The Seventh Circuit majority in *Pepsi-Cola* also appeared, implicitly, to reject the "line of business" limitation in the regulation. It said:

"The plaintiff Association cannot be disqualified merely because its members all bottle a particular soft drink product. It is unreasonable to write into the statute and regulations a limitation wholly unsupported by the legislative history."

369 F.2d at 252.

The Court did not cite any legislative history. To the extent that it rejected the "line of business" limitation in the regulation it erred since, as we have already shown, the IRS regulation applicable to business leagues has the force of law. See pp. 9-10 *supra*; *Commissioner v. South Texas Lumber Co.*, 333 U.S. 496, 501 (1948).

(" . . . Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes and . . . they constitute contemporaneous constructions by those charged with administration of these statutes which should not be overruled except for weighty reasons.").

More importantly, the reasoning in *Pepsi-Cola* is contrary to that of the Second Circuit in *Produce Exchange Stock Clearing Ass'n*, *supra*, as the dissent by Judge Kiley recognized. 369 F.2d at 252-53. Judge Kiley reasoned, as had this Court, that under the doctrine of *noscitur a sociis* an exempt business league must be similar to a chamber of commerce, real estate board or board of trade. Judge Kiley found the activities of the Pepsi-Cola Bottlers' Association to be "solely for the direct benefit of its members," *id.* at 253, just like those of the clearing association in *Produce Exchange*. He found that the real purpose of these activities was to improve members' competitive business position, and therefore they did not improve conditions in an entire line of business as required by the regulation. He cited, and distinguished, two cases involving organizations whose activities *did* have that effect: *Commissioner v. Chicago Graphic Arts Federation*, 128 F.2d 424 (7th Cir. 1942); and *Crooks v. Kansas City Hay Dealers' Ass'n*, 37 F.2d 83 (8th Cir. 1929); See also *United States v. Omaha Live Stock Traders Exchange*, 366 F.2d 749 (8th Cir. 1966); *Texas Mobile Home Ass'n v. Commissioner*, 324 F.2d 691 (5th Cir. 1963); *American Plywood Ass'n v. United States*, 267 F. Supp. 830 (W.D. Wash. 1967). In all these cases, the improvement of conditions in an *entire* line of business was found to be the primary purpose of the organization.

The reasoning of Judge Kiley's dissent in *Pepsi-Cola* is persuasive and consistent with the purpose of the ex-

emption statute and with Second Circuit authority.' Just as in *Pepsi-Cola*, the National Muffler Dealers Association represents businesses dealing only in one brand of muffler. It engages in no communication with the public or with anyone other than its members and Midas, and its activities have no effect on conditions in the muffler industry as a whole. It therefore does not improve conditions in a "line of business", as required by the applicable regulation, and it is not a "business league" within the meaning of Section 501(c)(6) of the Code. Judge Pierce expressly relied on *Produce Exchange*, and rejected *Pepsi-Cola*, in ruling for the Government below. (A. 159).

Plaintiff attempts to undermine the controlling authority in this Circuit of the *Produce Exchange* case by asserting (1) that it is factually distinguishable (Br. 17-19), and (2) that it is out of date, since section 501(c)(6) of the Code was amended after the decision in that case to exempt professional football leagues. (Br. 19). Plaintiff's argument is that the Second Circuit's reliance on the doctrine of *noscitur a sociis* is no longer a valid test of the meaning of 501(c)(6) because a football league is not like any other organization made exempt by Section 501(c)(6), and does not confer a public benefit. (Br. 19-20).

Plaintiff's argument is fallacious. The legislative history of the amendment * makes it clear that professional football leagues were *always* considered "business leagues." The purpose of the amendment was to make it clear that the exemption was not lost if the league administered a pension fund for football players, a fact which would otherwise run afoul of the statutory requirement that no part of an exempt league's earnings may

* The amendment reads: "professional football leagues (whether or not administering a pension fund for football players). . ."

inure to the benefit of an individual. Conf. Rep. No. 2308, 89th Cong., 2d Sess., 1966 U.S. Code Cong. & Admin. News 4372, 4377-78. Therefore the IRS regulation interpreting Section 501(c)(6) still has the force of law, pp. 9-10 *supra*, and so too does the Second Circuit's interpretation of this regulation in *Produce Exchange*. Appellant's counsel's difficulty in discerning the public benefit conferred by football leagues hardly lessens the force of the precedents.

Appellant cites two Revenue Rulings as evidence that organizations similar to the Association have been granted business league exemptions by the Internal Revenue Service. (Br. 26-27). These Rulings are distinguishable in a manner that goes to the heart of the reasons why the Association is not exempt.

In Rev. Rul. 61-177, 1961-2 Cum. Bull. 117, the only question addressed was whether an organization that *otherwise qualified* as an exempt business league was not exempt because its "principal activity is the advocacy of legislation beneficial to such common business interest." *Id.* There is no indication in the Ruling that the organization failed to meet the "line of business" requirement of the regulation, or any other requirements. Unlike that organization, the Association fails to meet that test.

Rev. Rul. 65-164, 1965-1 Cum. Bull. 238, is similarly distinguishable. The organization involved appears clearly to have met the "line of business" requirement. The Ruling states that "The organization's only activities consist of negotiation of written collective bargaining labor contracts, the interpretation of such contracts, and the adjustment of labor disputes *on an industrywide basis*. . . ." (Emphasis added.) The Ruling also notes that the organization served the common interest of its members "both in purpose and in operation." *Id.* at 239. Contrary to this organization, the Association does not conduct any

activities, and certainly not its primary activities, on an industry-wide basis.

Two more recent Revenue Rulings also highlight the contrast between the Association's factual showing and that necessary to justify a finding that it is a business league. Rev. Rul. 76-409 and 410, 1976 Int. Rev. Bull. No. 43, at 11. In Rev. Rul. 76-409, the Internal Revenue Service found that an organization of certain finance adjusters was not a business league, where each member was allotted a franchise in a certain area, to the exclusion of other finance adjusters, and where the organization published a directory of its members. The IRS found that "the organization is operated primarily to assist its members in their individual businesses rather than to improve the profession as a whole." In the same way, the Association's activities in the case at bar benefit only its members, and not any profession as a whole.

Revenue Ruling 76-410, on the other hand, found that an association of insurance companies providing a pool to protect persons injured by uninsured motorists was an exempt business league. This was because the obligation to furnish such protection was imposed upon insurance companies doing business in the state by state law, and *every* insurance company doing business in the state was required to be a member of the association, and therefore the association conferred no competitive advantage. The appellant Association, of course, is not in the same position, since it represents such a small portion of the muffler industry and, at that, represents only dealers of a particular brand, which gives Midas dealers a competitive advantage over other muffler dealers. As Judge Pierce found, the Association's activities do not improve conditions in the muffler industry as a whole.

The appellant's own factual showing in this case demonstrated that the Association has at all times

"merely serve[d] each member as a convenience or economy in his business." *Produce Exchange Stock Clearing Ass'n v. Helvering, supra*, 71 F.2d at 143. The appellant failed to prove that its activities conferred any public benefit, not because its witnesses were precluded from offering opinions but because they offered no facts that would require a factfinder to conclude that there was such a benefit. Likewise, appellant failed to meet the "line of business" test because its own figures, unreliable as they were, showed that its members accounted for only a small portion of the muffler industry. Accordingly, the District Court was eminently correct in finding that the Association had failed to meet its burden of demonstrating that it was a business league.

CONCLUSION

The judgment of the District Court dismissing the complaint should be affirmed.

Respectfully submitted,

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October, 1977

AFFIDAVIT OF MAILING

State of New York) ss
County of New York)

Marian J. Bryant being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies
11th day of October 1977 she served/~~an~~ copy of the
within Brief for Appellee

by placing the same in a properly postpaid franked envelope addressed:

Hoffberg, Gordon, Rabin & Engler
• 32 East 57th Street
New York, New York 10022

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Marian L. Bryant

11th day of October, 1977

Lawrence Mason

Notary Public in and for New York
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